power to act, which I deny, after the passage of the ordinance of the 6th of May, 1858, and without regard to the time fixed for action. The Railway Company does not possess the power to occupy and use the streets in the complainant's bill mentioned, and it is my duty to grant the preliminary injunction as prayed for, to restrain them from so doing. The majority of the judges who sat in the hearing of this case, concur in opinion that the injunction should issue. The reasons given are my own. Decree accordingly.

In the Quarter Sessions of Allegheny County, December, 1858.

COMMONWEALTH *vs.* GEORGR SHAW.

1. When a juror is withdrawn from the panel at a criminal trial, even by consent, the fact must be noted of record.
2. The record must show that twelve jurors were sworn, and if it appear that less or more than twelve delivered the verdict, it is error.
3. Waiver by consent of a prisoner in a criminal case, is a nullity.

In the month of October, 1858, George Shaw was indicted, tried and convicted, in the Quarter Sessions, of an attempt to abduct or kidnap Geo. W. Ferris, an alleged negro, out of the State, for the purpose of selling him into slavery. On the second day of the trial one of the jurors was taken sick, as was alleged. By consent of counsel the court allowed the trial to proceed with eleven jurors. A full report of the trial will be found in the Pittsburg Legal Journal of Oct. 23, 1858, (No. 15, vol. 6.)

A motion in arrest of judgment and for a new trial was made by prisoner's counsel, who assigned numerous reasons therefor, of which the following was most relied on.

That the verdict rendered was not the verdict of a jury under the constitution and laws, inasmuch as it was the verdict of eleven jurors—the twelfth, after being duly sworn, and hearing part of the evidence, being absent and not joining in the verdict.

Authorities.—Const. sect. 6, art. IX; 4 Binn. 424; 5 Barr, 208;

1 Chitty Cr. L. 585; 3 S. & R. 237; 1 Harr. 200; 1 Chitty Cr. L. 629-30; 2 Hale, 296, (note 2.)

The motion was argued on the 30th of October, by *Marshall Swartzwelder* for the prisoner, and by *John M. Kirkpatrick* for the Commonwealth. A complete report of the argument and authorities cited is given in the Pittsburg Legal Journal of Nov. 6, 1858, (No. 17, vol. 6.)

The following opinion of the court, granting the motion, was delivered December 18, 1858, by

McCLURE, P. J.—The verdict in this case was the verdict of eleven jurors.

During the progress of the trial, when the names of the jurors were called in the morning, one was absent. It appeared he was seized with a sudden and violent illness during the night, and it was manifest and conceded that his further attendance during the trial was out of the question. The prisoner's counsel at once said he was willing to go on with eleven jurors. The District Attorney instantly replied that the Commonwealth had no objections. The case went on; the prisoner was convicted.

The momentous question arises in this case, whether judgment can be pronounced on a verdict rendered by eleven jurors. This question is of paramount importance, and no other reasons will be noticed which may have been filed in arrest of judgment or for a new trial.

To say that the record shows that twelve jurors were sworn, and that the record imports absolute verity, is to say nothing. A true record not only imports absolute verity, but is what it imports to be, absolute verity. Should the record fail to exhibit the fact "that from the sudden illness of a juror, the case was tried by eleven," then the record would suppress the truth, and would cease to be what it imports, viz: absolute verity. An honest record, like an honest witness, must tell the whole truth. The record either was or is untrue, or incomplete. It first exhibits twelve jurors were sworn; that is true. It afterwards exhibits that the verdict was rendered by eleven jurors; this is true also. There can be no record of an event until the event transpires. Nor can the absence

of a juror be matter of record before it was a fact. Nor could there be a record of a verdict rendered by eleven jurors, until after it was rendered. A record of a court, like any other historical detail, or narrative of facts as they occur, is chronological. An incomplete record is, as it imports to be, absolute verity, as far as it goes, but it is incomplete. When completed the record is perfect. But if a record is let be and remain incomplete, it is not verity. To omit in this record the fact that the verdict was rendered by eleven jurors, would be a suppression of the truth and a suggestion of falsehhood both at once. The record itself would suggest and suppress. It would suggest that twelve jurors render the verdict, as it shows that twelve were sworn; it would suppress that eleven render it, &c. But I will pursue no further.

These remarks show how careful courts must be of entries on their records. It was the duty of the court to note the fact of record, and it is so recorded.

The question here is, "can the agreement of counsel dispense with a juror in the trial of a criminal case, or can a lawful trial be had with eleven jurors?"

The sixth section of the ninth Article of the Constitution, is in these words: "Trial by jury shall be as heretofore, and the right thereof remain inviolate."

This provision is in the bill of rights. The word inviolate is a very unusual word occurring in a written constitution. It clearly denotes anxiety and jealousy in its framers. Inviolate means unhurt, uninjured, unprofaned; inviolable means unsusceptible of hurt.

When the framers of the Constitution say "trial by jury shall remain as heretofore," nothing can be plainer, for that was well known; but they add the solemn mandate that "the right thereof shall remain inviolate," and, however well they must have known that courts and legislatures might, through ignorance, or accident, or inadvertence or haste, adjudicate or enact unconstitutionally in other cases, they seemed determined that here there should be no mistake.

The framers of the constitution were perfectly familiar with the

judicial history of England, and the trial by jury there and elsewhere. They knew that this mode of trial was coeval with the first civil government of that country. They well knew that its establishment and use in that island was always so highly valued and esteemed by the people that no conquest, no change of government, could prevail upon them to abolish it; and that in the Magna Charta it was insisted on as the principal bulwark of their liberties. They knew that Rome, Sparta and Carthage had lost their liberties, but they knew also that these empires were strangers to the right of trial by jury when their liberties were lost. They knew that this mode of trial sprung up under and outlived the feudal despotism of the Plantagenets; that it survived the iron rule of the house of Tudor and the house of Stuart; and that in 1790, the date of the constitution, it flourished in full vigor, as it flourishes still.

I make this cursory allusion for the purpose of suggesting how natural it was that the framers of the constitution, in the provisions in the bill of rights, might well be jealous, peremptory, and emphatic.

Blackstone and other legal writers, call the right of trial by jury a sacred right. The trial by jury means trial by the country. Blackstone and all writers, antecedent and since, define a verdict to be "the *unanimous* decision of a jury."

I shall now refer to authorities:

If a juror be taken ill during the progress of a trial, either in felony or misdemeanor, the proceedings are at once interrupted. If there be no reasonable probability of the juror's early return to his duty, the remaining eleven should be discharged. The clerk of the Crown shall make an entry of the fact, with the reason of it, and the trial must be then recommenced, either at the same or a subsequent assizes. *Rex* vs. *Williams*, Russell & Ryan's Crown Cases, p. 224; 2 Hays' Dig. Cr. Law, p. 451.

The petit jury must consist precisely of twelve, and is never to be more or less, and this fact it is necessary to insert upon the record. If, therefore, the number returned be less than twelve, any verdict must be ineffectual and the judgment will be reversed on error. 1 Chitty's Cr. Law, p. 505.

Twelve jurors must appear on the record to have *rendered* their verdict, otherwise it is error. *Rex* vs. *St. Michaels*, 2 Blackstone, 719.

If only eleven jurors be sworn by mistake, no verdict can be taken of the eleven, and if it be, it is error. 2 Hale's Pleas of the Crown, p. 296.

Clyncard was convicted. It did not appear from the record that the number of jurors was twelve. The court said it must appear, for if the verdict were presented by a lesser number, it was clearly ill, therefore judgment reversed. Croke Elizabeth, p. 654.

If a juror be sick so that he cannot *deliberate*, and a verdict be taken, it is the verdict of the other eleven, and will be set aside. *Den* vs. *Baldwin*, 2 Pennington, 945.

A jury must consist of twelve men; no other number is known to the law. *Dixon* vs. *Richards*, 2 How. 771; 6 Blashford, 461; 22 Ohio, 296.

In case of a trial by a petit jury, it can be no more nor less than twelve, and all assenting to the verdict. Accordingly, it was adjudged the judgment be reversed, because but eleven indictors. 2 Hale's Pleas of the Crown, p. 161.

Judgment was reversed, where it appeared the case had been tried by thirteen jurors. *Whitemarsh* vs. *Davis*, 2 Haywood, p. 113; Whar. C. Law, 326, 4th ed.; *State* vs. *Ford*, 1 Cas. Law Rep. 510.

The legislature cannot constitutionally impose any provisions restrictive of the right of trial by jury. *Emerick* vs. *Harris*, 1 Binney, 424.

The trial by jury shall be as heretofore; that is, in all civil and criminal cases in court. The right of trial by jury, especially in criminal cases, must be preserved inviolate, and it is error if it does not appear by the record of a trial of an indictment, that the defendant was tried by twelve jurors lawfully sworn. *Doebler* vs. *Com.*, 3 S. & R., 237.

Where a juror, after having been sworn, fails to appear, the court should either compel his attendance or dismiss the jury and empannel another jury to try the case. *Pennell* vs. *Perceval*, 1 Harris, 201.

A jury after being impanneled and sworn, were, by consent of prisoner's counsel, allowed to separate. On that account, alone, judgment was reversed. The court treated the consent as a nullity.

The Supreme Court of Pennsylvania has uniformly reversed, even in civil cases, where it appeared the verdict was rendered by eleven jurors, or where it appeared that thirteen jurors were sworn.

The compulsory arbitration law of this State was by some deemed unconstitutional, and so it would have been had there been no provision for an appeal which secured the right of trial by jury. This law only applies to civil cases.

In a recent case in New York, *at request of prisoner's counsel*, a juror was permitted to withdraw, and the facts were reduced to writing and entered on record. The prisoner was convicted, *the record of the court below exhibiting that he was tried by twelve or eleven jurors.* The case was taken up on error, and the Court of Appeal reversed the judgment. *The people* vs. *Michael Cancemi*, not yet reported. The juror withdrew at the *suggestion and wish* of the prisoner and his counsel in writing.

Whatever may be the magic of the number twelve, as legal antiquarians have endeavored to trace it, its unanimity seems always to have been required in criminal cases, although not so certainly settled in questions of property, until the reign of Edward the Third. 2 Reeves' History of the English Law, 270.

Public interests cannot be waived; private rights may. The Constitution of New York permits a waiver in civil cases, for that concerns private interest, but it suffers no consent in criminal cases. The Constitution of Pennsylvania does not permit it either in civil or criminal cases. No consent can alter or modify the known, certain, uniform, permanent prescribed rules of trial in criminal cases. To try with eleven or thirteen jurors is to create a new tribunal, unknown to the constitution or law. This no counsel, or citizen, or court, or all three, can do.

Article 9, section 9, of the constitution, is in these words: "No one can be deprived of life, liberty or property, unless by the judgment of his peers, or by the law of the land."

The foregoing authorities demonstrate that a trial by eleven

jurors, although by consent and at the request of a prisoner, is not "by the law of the land," but contrary to the law of the land.

Criminal prosecutions involve public wrongs, a breach and violation of public rights and duties, which affect the whole community, considered as a community, in its social and aggregate capacity. A man may do what he pleases with that which is his own, but in a government no man's liberty or life is exclusively his own; the commonwealth has an interest in both, and disdains to abridge the one or forfeit the other, except in the precise manner and form she herself has prescribed and pointed out.

Some of the cases referred to were felonies, some misdemeanors, and some civil cases. The rule applies to all three classes, but more especially to criminal cases. I can find no criminal case tried by eleven jurors but what has been reversed; nor civil case in Pennsylvania but what has been reversed. I have by no means exhausted the authorities, but chosen those, omitting some, which are respected and acquiesced in by the profession. The cases ruled in the Supreme Court of Pennsylvania, whose authority is binding and absolute, decide this motion independent of other reference.

If one juror can be dispensed with, or one juror added, then no reason can be given why any number may not be dispensed with or any number added. The law allows no addition or subtraction, nor any other number than the number twelve.

From the foregoing authorities the following propositions, among others, are self-evident.

1. When a juror withdraws from the trial, the fact must be noted of record.

2. The record must show that twelve jurors were sworn. If it appear that less or more than twelve delivered the verdict, it is error.

3. Waiver by consent of a prisoner in a criminal case, is a nullity.

In this case twelve jurors were sworn, and eleven delivered the verdict. Judgment arrested, and the prisoner remanded for trial.[1]

[1] We are indebted to the Pittsburg Legal Journal for this case.—*Eds. A. L. Reg.*